

Student ID No. 7658202

Professor Manheim
Communications Law Spring 2006

Charles Pressman ID No. 7658202
Professor Manheim; Communications Law

To: The Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Junk Fax Prevention Act of 2005
05-338

Docket No.

COMMENT PURSUANT TO NOTICE OF PROPOSED RULEMAKING AND ORDER

Pursuant to NPRM Sec. V (D) para. 40

Concise Summary of Discussion

I argue against adopting a broad interpretation of the JFPA's "Established Business Relationship" (EBR) exemption to the Telephone Consumer Protection Act of 1991's prohibition of "unsolicited advertising via facsimile machine." I argue that a broad interpretation of the EBR exemption and its corollary, the "Opt Out" provision, would unnecessarily weaken existing law protecting subscribers from unsolicited, or "junk" faxes. Alternatively, in interpreting the EBR and "Opt Out" provisions, I urge that the Commission adopt an objective standard of review to be applied case by case to "junk fax" complaints to determine whether "a reasonable recipient" would think the unsolicited fax is legitimate business, or "junk". I conclude that this objective standard of review would allow business which are currently prohibited from sending unsolicited faxes the latitude to send legitimate unsolicited faxes while maintaining sufficient subscriber protection from "junk faxes".

Comment on the Correct Standard of Interpretation to Apply
to the Junk Fax Prevention Act of 2005

INTRODUCTION

In this letter I comment on rules proposed to implement the Junk Fax Prevention Act of 2005 (JFPA) which amends the Telephone Consumer Protection Act of 1991 (TCPA). I respond to the request for comments concerning the issues surrounding the "Established Business Relationship" (EBR) exemption to the TCPA's blanket prohibition against "sending an 'unsolicited' advertisement to a [person's] facsimile machine...without that person's prior express invitation or permission".¹ I argue that the commission should not broadly interpret the EBR exemption provision because a broad reading of the EBR exception could allow virtually unlimited unsolicited fax advertising and would weaken existing rules which better safeguard business and residential subscribers' privacy and resources. I argue that the "Opt Out" provision is at odds with the fundamental premise of the TCPA because an "Opt Out" requirement shifts the responsibility of preventing "unsolicited advertising" from the sender to the recipient - a situation patently backwards from the intent of the TCPA.² Therefore, I

¹ 47 U.S.C. §227(b)(1)(C); 47 C.F.R. § 64.1200(f)(10). (the term "unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission").

² GC Docket No. 05-388 III (C)(1)(19). "Section 2(C) of the [JFPA] requires senders of unsolicited [fax] advertisements to include a notice on the first page of the [fax] that informs the recipient of the ability and means to request that they not receive future unsolicited [fax] advertisements from the sender". Also, in fairness to this provision it would require "a cost-free mechanism for a recipient to transmit a request... to the sender". But this requirement is largely undone by the following lengthy discussion of the hardships this system could wreak on small businesses. In other words a "small business" could send a junk fax at the recipient's expense, and then claim it is too expensive for it to process an "Opt Out" request. GC Docket No. 05-388 Appendix para. 50-55.

argue that the "Opt Out" provision should be interpreted only as an additional layer of protection against unsolicited faxes, rather than as a mere requirement attendant to sending junk faxes. And, I also argue that under a more limited interpretation of the JFPA, inquiring whether a sender has obtained a subscriber's fax number "within the context of [an] EBR" is unnecessary because the threshold question should not be whether permission to fax may be implied from the existence of a business relationship, but rather whether under an objective standard a fax is *Junk*.³

I conclude by arguing that the TCPA currently is strong enough to protect consumers from junk faxes and flexible enough to allow legitimate but unsolicited faxes. I argue that any interpretation beyond the narrowest possible of the EBR exemption, and the "Opt Out" provision would be counterproductive to the intent of the TCPA and therefore should not be applied when interpreting the JFPA. I urge instead that a more effective interpretive scheme would be to apply an objective "reasonable recipient" standard of review to unsolicited fax advertising. If an objectively reasonable recipient would consider the fax "junk", then it is prohibited under existing rules. If the unsolicited fax is objectively legitimate business between the sender and recipient, permission may fairly be implied, and thus would be permissible under the JFPA whereas it

³ GC Docket No.05-388 III (A)(2)(11). The JFPA provides that "the sender [must have] obtained the [fax] number... through the voluntary communication of such number, within the context of [the EBR] from the recipient, or from a *directory, advertisement, or site on the internet*... Italics mine.

would be prohibited under the TCPA. This scheme would be flexible enough to allow businesses to fax legitimate advertising and still prohibit "junk faxes".

In support of the validity of my proposed interpretive scheme I cite *Chevron USA, Inc. v. National Resources Defense Council, Inc.* wherein the U.S. Supreme Court gives guidelines for judicial deference to an agency's own interpretation of its rules. *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Specifically, *Chevron* says that in the case of an ambiguous statute courts shall defer to the agency's own interpretation of its statutory mandate, unless that interpretation is patently arbitrary or capricious. Here, the EBR exception is so amorphous and ill defined that the Commission seeks comments on when an EBR should be considered to begin and end.⁴ Until this basic feature is interpreted it seems possible that a person could have entered into an EBR and not even know it. Clearly, the contours of the EBR as set forth in the JFPA are ambiguous. Therefore, judicial deference to the Commission's interpretation of the parameters of the EBR provision would rightly be allowed and followed under *Chevron*.

DISCUSSION

I first review the reasoning underlying the overarching policy rationale of the TCPA. I then discuss the ways that a broad reading of the EBR exemption of the JFPA would undermine both the effectiveness of the TCPA and the rationale supporting the TCPA. I also discuss the "Opt Out" provision as it relates

⁴ CG Docket No. 05-338 III(B)(2)(17).

to sending faxes pursuant to the EBR exception. The issue of implied permission to fax is intertwined with an EBR and the "Opt Out" provision because under the JFPA an EBR implies permission to send a junk fax, and then only after receipt of the junk fax can the recipient "Opt Out" of receiving future junk faxes. I then propose an alternative interpretive scheme to apply to the EBR exemption and "Opt Out" provisions, namely a "reasonable recipient" standard of review.

When interpreting a statute, a natural starting point is to look at the plain language of the title of the statute at issue. The title of this statute - The **Junk Fax Prevention** Act- expressly contains the rationale for curtailing unsolicited advertisements via facsimile machines. (Italics mine).

Junk: Webster's Unabridged Dictionary defines **junk** as: 2) Anything that is regarded as worthless, meaningless, contemptible, or mere trash;

and Webster's illustrates **prevent** as follows:

Prevention: To prevent is to stop something effectually by forestalling action and rendering it impossible.

Thus within the context of the TCPA and the JFPA, **junk fax** seems to be synonymous with **unsolicited advertising via facsimile machine for which the sender lacks the recipient's express or implied permission**.

The Junk Fax Prevention Act of 2005 amends the TCPA. More precisely it seeks to replace the 2003 revisions to the TCPA requiring "that the recipient's express permission must be in writing and include his signature" with the EBR exemption and

the "Opt Out" provisions of the JFPA.⁵ The TCPA was enacted in response to overwhelming abuse of the telephone system by advertisers seeking to make direct, but unsolicited, contact with potential customers. The accident of telephone technology ubiquity provided a framework that was ripe for exploitation of this type. Namely, a mechanism by which an advertiser could initiate live person to person contact with a potential customer via a nearly free - and until the advent of caller I.D. anonymous - entry into consumers' homes. Existing social habits further assisted this intrusion by virtue of the fact that people generally answer their phones when they are home and able to. Eventually the answering machine provided a buffer to those willing to screen their calls. But as the practice of telephone marketing grew, this buffer became a virtual necessity for anyone disinterested in engaging in a conversation with a salesperson. Once a person answers his phone he is then in the social position of telling a professional salesperson "no". In other words, the mere fact of answering an unsolicited sales call requires affirmative action by the uninterested consumer; he must say "no" to the caller's often repeated entreaties. Then, if the sales caller still proves tenacious, the consumer must "hang-up" on the caller, a social practice widely thought to be rude. Thus the mere fact of answering the phone to an unsolicited sales call often can force a consumer to violate a generally held social value, an unpleasant experience for many. The twin tools of inexpensive and easy access to consumer households and

⁵ 2003 TCPA Order, 18 Rcd at 14128-29, para. 191. See also Docket No. 05-338 II(B) (4-5).

people's general psychological disposition to avoid social unpleasantness proved so powerful a mechanism for intruding into consumers' homes that Congress enacted a law to reduce these intrusions; the TCPA.

Now, thanks in part to the TCPA, and again partly due to the accident of technology, consumers have several powerful tools to protect themselves against unwanted calls: answering machines, caller I.D., the "Do Not Call List", and the TCPA statute itself - 47 U.S.C. 227.

In plain language, the current situation is this: The TCPA prohibits the sending of unsolicited faxes without the express permission of the recipient. The JFPA seeks to create loopholes in this prohibition. The reasoning for creating these loopholes seems to be that under the TCPA it is just too hard for some senders to send junk faxes. I argue that that is precisely why the JFPA should be narrowly interpreted, and should not be read to allow exceptions which transfer the burden of "Opting Out" onto the recipient after receiving a junk fax.

Facsimile machines merely present a variation on the same telephone marketing theme. Although fax machines may seem substantially different from telephones, when it comes to their use in telemarketing, any substantive differences are superficial. Fax machines, instead of calling for a person to answer call for a machine to answer. And, instead of requiring a person to refuse, if he chooses, the offered products or services, alternatively the fax machine would make a tangible record that the subscriber could review at leisure. Under this

premise it could be argued that the fax actually alleviates the problems of unwanted interpersonal contact from sales calls. However, unsolicited faxes also present unique impositions on subscribers which offset any mitigating effect they may have as an alternative to unsolicited phone calls. First, the fax alerts like a phone - it rings. And in the context of junk faxes, it rings not uncommonly at 3:00 A.M.. Simply disabling the ringer as means to protect against unsolicited ringing defeats a key feature of the fax machine for its intended use. Moreover, even if the ring is disabled the machine still answers and manufactures the fax. This unsolicited fax puts consumers' resources, namely the phone line, toner, paper, and garbage, at the disposal of the sender. Unlike an unsolicited unwanted phone call which intrudes but merely wastes a consumers time, the junk fax makes the receiver pay for the message thereby subsidizing the senders efforts. Thus the junk fax is at least equally as insidious as unsolicited telephone calls. Therefore, any new rule adopted should continue to discourage unsolicited faxes as strongly as the existing TCPA.

Moreover, the burden - and it should be a substantial one - of proving a legitimate invitation should fall entirely on the sender. Where there is in fact a legitimate business relationship, and not merely a pretextual "existing business relationship", securing permission to fax and proving such invitation should be easily accomplished by a sender. I argue that within the context of a legitimate business relationship permission to fax would be implied as a foregone conclusion. In

fact, if the business relationship is legitimate, it seems that a sender would rarely if ever be put to proof of invitation. If obtaining permission is unwieldy or impossible, the obvious inference is that the business relationship is not legitimate. Therefore, the fundamental question that should guide a discussion of rules ostensibly for preventing junk faxes should be, "does a *legitimate* business relationship exist?" In light of the above rationale I comment on the EBR exception, and the "Opt Out" provisions of the JFPA.

The JFPA proposes to extend the Commission's definition an EBR to include businesses as well as residential subscribers.⁶ In other words, under the JFPA both businesses and residential subscribers would become eligible to receive junk faxes whereas both are currently protected under the TCPA's blanket prohibition of unsolicited fax advertising. The Notice of Proposed Rulemaking also poses questions focusing on the timing of an EBR; e.g., when should an EBR begin and end. And the Commission seeks comments on this topic.⁷ Apparently, the Commission thinks it necessary to analyze whether a recipient of a "junk fax" might be more likely to complain if the "junk fax" were sent from an older acquaintance. To this end the JFPA requires analyzing whether the relative age of a business relationship was the cause of a

⁶ CG Docket No. 05-338 III (B) (1) (12); III (B) (1) (14) defines an EBR:...a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party. (C.F.R. §64.1200(f)(4)).

⁷ CG Docket No. 05-338 III (B) (2) (17)

significant number of complaints.⁸ However, I argue that defining by its duration the legitimacy of a purported EBR, which gives rise to the implied permission to send unsolicited faxes, is not necessary. Rather it is the objective legitimacy of any particular fax which can amply demonstrate whether a legitimate business relationship exists between the sender and the receiver. The age of the junk is unimportant. The junk itself is the issue.

The major premise of the JFPA is that if an EBR is in effect, then permission to fax is implied. However, I argue that focusing objectively on the quality of the relationship would provide a more realistic framework for analyzing whether a fax is "junk" or not. If an "unsolicited advertisement" is a "junk fax", then it is already prohibited by the TCPA. If an unsolicited fax is a legitimate business correspondence, then I argue there will be few complaints. Succinctly, if an objectively reasonable recipient would consider his relationship to the sender substantial enough to justify receipt - and underwriting the cost - of the fax, then a legitimate business relationship may be found to exist and permission implied. Whether a reasonable recipient would consider the fax legitimate could arguably easily be determined from the circumstances, i.e., the history of the relationship and the suitability of the product to the recipient. Moreover, the sender would have its own empirical data to guide it in determining whether a fax is objectively

⁸ CG Docket No. 05-338 III(3)(2)(B) para. 13. "...the Commission shall...determine whether a significant number of any such complaints... were sent on the basis of an [EBR] that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers". See also Junk Fax Prevention Act, Sec. 2(f).

legitimate such as a ratio of its faxes to sales. For example, a ratio of, say, 10 faxes/1sale would be ample evidence that an objectively reasonable recipient would consider the fax "junk", whereas a 2 faxes/1 sale ratio might well qualify the fax as legitimate. By interpreting the EBR exemption and "Opt Out" provision under an objective standard of legitimacy for any particular fax the onus is correctly placed on the sender to refrain from sending "junk". A sender must "junk fax" at his own peril.

The EBR exemption seeks to carve out certain circumstances under which "junk" could permissibly be sent. A broad reading of the EBR exemption would allow a sender carte blanche to fax away - junk or not - so long as the sender can claim an EBR under the Commission's definition. Mere contact with a sender could be sufficient to give rise to an EBR. Thus, under a broad reading the "Opt Out" provisions are analogous to closing the barn door after the horse has escaped. It gives the sender a "shoot first, ask questions later" framework to operate in. Utilizing the "Opt Out" procedure places the onus on the recipient to use self-help. Moreover, the "Opt Out" provision would merely help to deter additional future junk rather than bolster efforts to "prevent" junk faxes in the first place. Thus, applying a broad interpretive scheme to the EBR and "Opt Out" provisions would turn the language of "The Junk Fax Prevention Act" inside out. If the Commission adopts rules allowing a broad reading of the EBR and "Opt Out" provisions, then the act would more accurately be named The Junk Fax **Permission** Act. Under a broad

reading the EBR exemption would set forth allowable conditions for a sender to send junk, and the "Opt Out" provision would place the burden on the recipient to "request" that the sender cease faxing junk. Under the JFPA, the "Opt Out" provisions would be merely the fax version of saying "no" after the unsolicited caller has intruded. The only difference is that the recipient must make his hostility known via initiating a return correspondence of some sort. But the junk sender has already intruded. Thus under a broad reading of the EBR and "Opt Out" provisions the JFPA would not prevent much of anything.

CONCLUSION

When the practical application of adopting the EBR and "Opt Out" scheme would be to invert the plain meaning of the very title of the Act, the result is nothing short of a regulatory "bait and switch". This cannot be what Congress intended when it enacted the TCPA or the JFPA. Therefore, for the above reasons, I urge the Commission to maintain the protection against junk faxes that the TCPA already provides, and dispense with any broad interpretation of the EBR and "Opt Out" provisions of the JFPA. I urge instead that the Commission adopt rules applying a "reasonable recipient" standard of review to unsolicited fax advertising. This narrower interpretive scheme would more appropriately strike a fair balance between allowing businesses necessary freedom to send legitimate correspondence while simultaneously preventing "junk faxes".